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No. 02-1183

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SAMUEL FRANCIS PATANE,

Respondent.

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Petition for a Writ of Certiorari to the
The United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice, established in 1995 to honor the legacy of Justice William J. Brennan, Jr., is a nonpartisan institute dedicated to scholarship, education and legal action to promote human dignity and fundamental freedoms. Its criminal justice program promotes policies to serve communities affected by crime and to meet legitimate law enforcement needs while preserving constitutional values.

SUMMARY OF ARGUMENT

Unlike the typical *Miranda* cases of thirty or twenty years ago, the present case and many others now coming before the courts do not involve the unavoidable errors of police officers who trip over technical details. Increasingly, courts are being confronted with police officers who deliberately flout the *Miranda* procedures or inexplicably disregard its most basic requirements. Though described to this Court as a narrow problem concerning "derivative fruit," the issue presented—as the court below recognized—goes to the heart of whether American police will continue to respect the *Miranda* safeguards in day-to-day interrogation practice.

The facts of this case make these stakes concrete. The *Miranda* violations were substantial and inexcusable. This Court has never, post-*Miranda*, permitted prosecutors to make affirmative use of direct physical fruits under such circumstances. And as the court below understood, such police misconduct, whether characterized as intentional or inexcusably negligent, cannot be condoned without sending a clear signal that courts no longer consider compliance with *Miranda* to be an important part of routine police procedure.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

To support reversal of the judgment below, the Government seeks a substantial reorientation of long-settled *Miranda* jurisprudence. The Government argues that deterrence of future police misconduct should be discarded as a goal of the *Miranda* exclusionary rule, that *Miranda* should be understood *solely* as a guide to admissibility decisions at trial, and that its purpose "is not to regulate out-of-court conduct by *the police*." Brief for the United States ("Br. U.S.") 29-32.

This approach is bad law and bad policy. It conflicts with decades of *Miranda* precedent and with well-settled understandings of *Miranda* in the law enforcement community and within our wider national culture. To destabilize the foundations of *Miranda* at this late date, and so closely on the heels of this Court's recent reaffirmation of that decision, would cloud the public legitimacy that *Miranda* now confers on police interrogation practices. A new approach in which this Court permits police to exploit their own intentional or negligent disregard of *Miranda* will inevitably promote public cynicism about law enforcement and indeed about the law itself.

At the day-to-day level, an approach that rejects traditional attenuation principles and gives the voluntariness test new importance would generate significant practical problems. It would damage law enforcement by creating uncertainties for police and disrupting the practices they have successfully used to adapt to *Miranda*. It would also complicate judicial suppression decisions; in the present case, as in every future case involving a *Miranda*-fruits question, courts would be required to rule on difficult voluntariness issues that *Miranda* was meant to avoid.

A decision to reverse the judgment below will also require this Court to decide whether to impose *any* limit on the use of derivative evidence. If the fruits of deliberately disregarding *Miranda* are to be excluded, courts considering the admissibility of derivative evidence will have to resolve two subjective inquiries—one focused on the state of mind of the suspect and another focused on that of the officer. But a decision that avoids that result—by permitting use of fruit

obtained by deliberate disregard of *Miranda*—would generate corrosive cynicism about law enforcement. Even if the Government's new conception of *Miranda* were theoretically sound, the public reverberations of a decision permitting intentional departures from *Miranda* cannot be overlooked. In our national culture, the *Miranda* ruling, now a potent symbol of legitimacy in law enforcement, would become a highly visible example of legal sleight of hand.

Although this Court has been reluctant to adopt rules turning on subjective police intent, any rule that condones deliberate flouting of *Miranda* is even more troubling. This Court can avoid both difficulties, however, simply by holding that *Miranda*-fruits issues are governed by the traditional fruits analysis of *Wong Sun v. United States*, 371 U.S. 471, 483 (1963), and its progeny.

There is no legitimate law enforcement need for anything more. The flexible *Wong Sun* tests leave ample room for considering independent source, inevitable discovery, and a fact-specific attenuation analysis that weighs the seriousness of a *Miranda* violation and subsequent circumstances that dissipate the taint. This approach, developed over more than four decades, has successfully protected the integrity of constitutionally based standards while making reasonable allowance for legitimate law enforcement interests. It is sound law and good law enforcement policy to reaffirm this well-understood approach.

ARGUMENT

I. The Admitted *Miranda* Violations In This Case Were Substantial And Inexcusable.

This case involves three distinct violations of *Miranda v. Arizona*, 384 U.S. 436 (1966). Patane was led from his home in handcuffs, after being arrested for allegedly violating the terms of a restraining order. Joint Appendix ("J.A.") 46. Detective Benner, who was present to pursue a separate weapons-possession investigation, then began reading Patane his *Miranda* rights. When Patane interrupted to say that he knew his

rights, Benner stopped reading the warnings. He did not ask Patane whether he was willing to answer questions but instead immediately began his interrogation, telling Patane, "I need to talk to you about the gun." J.A. 47. Benner's stated reason for not completing the *Miranda* warnings was: "I was just trying to calm him down, because once outside the home he was very upset." *Id.* (internal page reference omitted).

Benner's failure to complete his recitation of the warnings violated one of *Miranda*'s best known and most elementary rules—the mandate to give warnings prior to *all* custodial interrogations. Even when a defendant thinks he knows his rights, automatic warnings are necessary to obviate debates about whether he knows, for example, that he has the right to have counsel present if he desires. *Miranda* is emphatic on this point: "[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed . . . can never be more than speculation; a warning is a clearcut fact." 384 U.S. at 468-69. Every moderately well-trained officer knows that complete warnings are required even when the arrestee is a lawyer or another police officer, or when the suspect says he has heard the warning "a million times before." *United States v. Bland*, 908 F.2d 471, 472 (9th Cir. 1990).[2]

Second, Benner proceeded to question Patane without obtaining a waiver. A valid *Miranda* waiver may be implied, but "[a] waiver cannot be presumed simply from the fact that *Miranda* warnings were given and a confession was eventually obtained." *United States v. Ramirez*, 710 F.2d 535, 542 (9th Cir. 1983). The standard procedure after warning the suspect is for the officer to ask whether he wants to say anything. *Id.* But here, none of Patane's words or actions—as Benner himself described them—indicated a willingness to speak before Benner began to interrogate Patane. J.A. 47.[3]

[2] *Accord United States v. Longbehn*, 850 F.2d 450, 453 (8th Cir. 1988) (although arrestee was a police officer, "[t]he requirement of *Miranda* warnings is not contingent either upon a defendant's actual or presumed knowledge of his rights"); *United States v. Espinosa-Orlando*, 704 F.2d 507, 514 (11th Cir. 1983) (although suspect told DEA agents that he understood his rights, "it must under *Miranda* be presumed that he was unaware of his right to appointed counsel"); *State v. DeWeese*, 582 S.E.2d 786, 796 (W. Va. 2003) ("[A] defendant cannot, as a matter of law, waive the reading of the *Miranda* warnings.").

Third, *Miranda* makes clear that an arrestee must not be "threatened, tricked or cajoled into a waiver." 384 U.S. at 476. But here, as Patane got "more upset about the domestic violence complaint," Benner told him that "to get in front of the domestic violence case, he needed to be truthful regarding the location of his firearm." J.A. 47, 48. Only then did Patane tell Benner that the firearm was in his bedroom and give permission for Benner to retrieve it. Whether Benner's statement was true or false (and there is nothing in the record to indicate that it could have been true), the statement unambiguously indicates that silence would put Patane at a legal disadvantage—he would not be able to put the domestic violence case behind him. If construed as a threat of adverse consequences, such a statement is "an egregious violation of *Miranda*." *Collazo v. Estelle*, 940 F.2d 411, 418 (9th Cir. 1991). But even if given a more benign interpretation, any representation that remaining silent will put the suspect at a disadvantage is a form of cajolery that *Miranda* specifically prohibits *prior* to waiver.[4]

Nor was there any plausible excuse for these missteps. Benner did not fear for his safety, did not bother to conduct a search incident to arrest, and did not worry that the gun was on Patane's person or within his reach. J.A. 47, 52. He acknowledged that no

[3] Though not phrased as a question, Benner's statement clearly constitutes interrogation, as the government concedes. Br. U.S. 9. *See Rhode Island v. Innis*, 446 U.S. 291 (1980).

[4] *See United States v. Pinto*, 671 F. Supp. 41, 59 (D. Me. 1987) (waiver invalid because of "explicit representations that it would be in defendant's best interest to cooperate"); *Commonwealth v. Gibbs*, 520 Pa. 151, 155, 553 A.2d 409, 411 (1989) ("[p]romises of benefits or special considerations, however benign in intent," render waiver invalid).

emergency prevented him from continuing to read Patane his rights. J.A. 47. Rather, Benner's stated reason for interrogating Patane without warnings—his perception that Patane was "very upset"—reflects a complete failure to understand *Miranda* and its importance for dispelling the inherently compelling circumstances of custodial interrogation. The Government does not (and could not) claim that Benner's conduct was objectively reasonable.[5]

II. No Decision Of This Court Has Ever Condoned The Affirmative Use Of Evidence Derived From A Substantial, Inexcusable Disregard Of *Miranda*.

Some lower courts, extrapolating from passages in *Michigan v. Tucker*, 417 U.S. 433 (1974), and *Oregon v. Elstad*, 470 U.S. 298 (1985), have allowed prosecutors to use derivative fruit of a *Miranda* violation, even in the absence of circumstances attenuating the taint. Yet *Tucker* and *Elstad*, read in their context, do not support any significant departure from ordinary attenuation principles.

Tucker involved an interrogation in violation of *Miranda*'s rules, which led police to a witness whose testimony was challenged as fruit-of-the-poisonous-tree. In holding that the witness's testimony was admissible, this Court stressed as "significant to our decision" the fact that the officer had conducted the questioning before *Miranda*, and therefore that the deterrent effect of exclusion would be minimal. *Tucker*, 417 U.S. at 447-48. The Court declined "to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded," noting that "we instead place our holding on a narrower ground." *Id.*

[5] The Government's only attempt to mitigate the seriousness of Benner's mistakes is its unsupported and conclusory assertion that the failure to give complete warnings was "[not] such culpable conduct as to warrant suppressing . . . the gun." Br. U.S. 34.

Elstad was likewise a fact-specific decision. Relying on numerous factual particulars,[6] this Court found that the alleged causal connection between the *Miranda* violation and the defendant's later statement was "speculative and attenuated at best." *Elstad*, 470 U.S. at 313-14. In such a situation, this Court concluded that the criteria of *Wong Sun* were sufficient to explain why the initial taint was purged. *Elstad*, 470 U.S. at 311 ("The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'" (quoting *Wong Sun v. United States*, 371 U.S. 471, 483 (1963))). Rejecting the charge that it was establishing a broad exception to ordinary fruits analysis, the Court noted that, "[f]ar from establishing a rigid rule, we direct courts to avoid one; . . . the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect . . . ." *Elstad*, 470 U.S. at 318. The court below did precisely that.

III. The Fifth Amendment And Its Supporting Doctrines Prohibit Affirmative Use Of Evidence Obtained By Violating The *Miranda* Safeguards.

Miranda created a system of constitutionally based procedures to protect Fifth Amendment rights. That system has always been understood to involve two distinct sets of requirements. *Miranda* establishes procedures that police are obliged to follow in custodial interrogation, and it establishes an exclusionary rule both to deter violations of those procedures and to insure respect for Fifth Amendment evidentiary principles at trial.

Each of these requirements independently mandates the exclusion of derivative evidence from the prosecutor's case-in-chief. The *Miranda* rules

[6] The *Elstad* Court emphasized that the *Miranda* violation was at worst a minor and debatable one, 470 U.S. at 315-16, the officers did not exploit the unwarned admission, *id.* at 316, and the later statement was a voluntary choice preceded by complete warnings, *id.* at 312-13.

applicable to the police are constitutional commands and, as such, they require remedies sufficient to insure compliance. In every context where this Court has recognized constitutionally obligatory rules of police conduct, it has always concluded that the exclusion of derivative evidence is essential to deter violations effectively. Similarly, the *Miranda* evidentiary rule applicable at trial, like the underlying Fifth Amendment privilege, makes sense only if it denies prosecutors the ability to make affirmative use of evidence obtained or presumptively obtained by "compulsion" to speak.

A. The *Miranda* Rules Applicable To The Police Are Constitutional Commands, And Prosecutors Therefore May Not Make Affirmative Use Of Evidence Obtained By Intentionally Or Negligently Disregarding Them.

The Fifth Amendment serves a "complex of values," *Miranda*, 384 U.S. at 460 (citing *Murphy v. Waterfront Commission*, 378 U.S. 52, 94 (1964)), and many of them are implicated only at trial. But no discussion of *Miranda*'s goals can omit mention of the Court's concerns about degrading treatment of arrested suspects, and the impairment of public respect for law enforcement that ensued. A central purpose of the Self-Incrimination Clause had always been to remove the incentive for brutality and other grave violations of individual dignity that history had shown to be inevitable when law enforcement can gain evidentiary advantage from compelling an individual to speak. *Murphy*, 378 U.S. at 55. The *Miranda* Court saw the policies underlying the Fifth Amendment as pointing to "one overriding thought: . . . the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460. Yet the vague voluntariness test had failed to protect that aspiration. In the setting of police interrogation, the Court concluded, "The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and

to physical force and torture." *Escobedo v. Illinois*, 378 U.S. 478, 489 (1964) (quoting 8 J. Wigmore, Evidence 309 (3d ed. 1940)). For the *Miranda* Court, interrogation as then practiced put at risk "the inviolability of the human personality." *Miranda*, 384 U.S. at 460.

Accordingly, as the *Miranda* Court concluded, a more robust framework for effectuating the Fifth Amendment privilege was needed. The Court announced rules for proper interrogation procedure and *required* police to follow them. That understanding of *Miranda* has been a constant of this Court's *Miranda* jurisprudence for nearly four decades. The great majority of police departments understand that the *Miranda* requirements are addressed directly to them, and they have long since adjusted to those requirements. Compliance with *Miranda* in day-to-day police practice no longer impedes effective crime control; indeed *Miranda* offers substantial benefits for responsible law enforcement.

Nonetheless, the Government argues that deterrence of future police misconduct should be discarded as a goal of the *Miranda* exclusionary rule and that *Miranda*'s "purpose, as properly understood . . . is not to regulate out-of-court conduct by *the police*." Br. U.S. 29-32. That view of *Miranda* is unsupportable. The *Miranda* rules are requirements that police are not free to ignore, and effective enforcement of that mandate requires the exclusion of evidence gained by disregarding it.

1. *Miranda* Established Rules That Police Are Obliged To Follow.

This Court's *Miranda* opinion used unmistakably clear language to announce that police were thereafter *required* to follow certain now-familiar procedures in every custodial police interrogation. *See Miranda*, 384 U.S. at 477 ("The principles announced today deal with the *protection which must be given* to the privilege against self-incrimination *when the individual is first subjected to police interrogation.*") (emphasis added); *id.* at 478-79 ("[W]hen an individual is taken into custody

. . . and is subjected to questioning, . . . *[p]rocedural safeguards must be employed.*") (emphasis added).

Subsequent decisions of this Court discuss *Miranda* in the same terms. Under those decisions, failure to comply with *Miranda* not only triggers an exclusionary rule at trial, but is considered *misconduct* that the evidentiary rules are intended to deter.[7]

New York v. Quarles, 467 U.S. 649 (1984), is clear on this point. Discussing the need for a public safety exception to *Miranda*, this Court focused on whether the officer's actions were improper at the time they occurred. *Id.* at 654-55 ("[T]he only issue before us is whether Officer Kraft was justified in failing to make available to respondent the procedural safeguards."). The Court stressed the need for police to have understandable rules so that they could know, at the moment of confronting a suspect, what steps they were permitted to take.[8] Nowhere does *Quarles* suggest that *Miranda*'s procedures are optional; on the contrary, the Court recognized a "narrow exception to the *Miranda*

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[7] *Tucker*, 417 U.S. at 447 ("The deterrent purpose of the [*Miranda*] exclusionary rule necessarily assumes that *the police* have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.") (emphasis added); *Quarles*, 467 U.S. at 656 (*Miranda* "was based in large part on this Court's view that *the warnings which it required police to give* . . . would reduce the likelihood that the suspects would *fall victim to constitutionally impermissible practices of police interrogation* . . . .") (emphasis added); *Dickerson v. United States*, 530 U.S. 428, 440 n.6 (2000) (*Miranda*'s decision to "*require police* to administer the particular *Miranda* warnings" would no longer apply if a jurisdiction adopted other, equally effective procedures) (emphasis added).

[8] *Quarles*, 467 U.S. at 658 ("[W]e recognize here the importance of a workable rule 'to guide police officers, who have only limited time and expertise to reflect . . . in the specific circumstances they confront.'" (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979))); *id.* at 659 ("The exception which we recognize today, far from complicating the thought processes and the *on-the-scene judgments of police officers*, will simply free them to *follow their legitimate instincts when confronting situations* presenting a danger to the public safety.") (emphasis added).

rule"; there was "no violation of *Miranda* in this case," *id.* at 658, 660 n.9, and therefore no misconduct to deter.

The view that police are required to comply with *Miranda*, and that it is wrong for them to do otherwise, is widely shared by the legal profession, the law enforcement community, and the general public. *See* Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice* 52 (1993) ("Every junior high school student knows . . . the principle that there are [*Miranda*] limits on police officer behavior, and penalties for breaking those rules."); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621, 679 (1996) (to the general public, *Miranda* "communicat[es] that there are moral and constitutional limits on the methods we will permit police to engage in during official questioning").

The isolated examples cited by the Government, in which police can question without warnings, Br. U.S. 33 n.9, are not to the contrary. The Government's reliance upon *Quarles* is particularly inapt. The point of *Quarles* is not that it is permissible for police to *disregard Miranda* but the altogether different principle that in situations involving public safety, the *Miranda* procedures do not apply. The Government's other examples, (interrogation aimed at terminating an ongoing kidnapping or extortion), fall within the same public safety exception. The Government's examples show only that the constitutionally based rules governing police interrogation have been and will be refined over time; such examples are themselves antithetical to the Government's novel theory that the *Miranda* procedures are not binding on the police at all.

Nor does *Chavez v. Martinez*, 123 S. Ct. 1994 (2003), wipe away these long-settled understandings. In *Chavez*, four members of this Court concluded that the core Fifth Amendment privilege is violated only when compelled evidence is introduced at trial, 123 S. Ct. at 2001 (opinion of Thomas, J.), but that view is not sufficient to support the reinterpretation of *Miranda* that the Government urges here.

First, five members of the Court either reached the opposite conclusion, *id.* at 2013 (Kennedy, J.,

concurring and dissenting), or expressed no view on the issue, *id.* at 2006-07 (Souter, J., concurring) (concluding only that out-of-court compulsion, if it does violate the Fifth Amendment, should not give rise to a civil damage remedy). Second, *Miranda* provides prophylactic protection for both the Fifth Amendment privilege and the Fourteenth Amendment voluntariness requirement; no member of the *Chavez* Court rejected the possibility that abusive interrogation, if it "breaks the will," could violate Due Process at the time it occurred[9]—a principle that finds ample support in past and contemporary understandings of ordered liberty.[10]

Finally, even if the Fifth Amendment can be violated only when evidence obtained by compulsion is introduced at trial, the Government here *does* seek to use evidence at trial, and therefore the issue that split this Court in *Chavez* is simply not relevant in this case. As we show in Section III.B, *infra*, there is an "unacceptably great" risk, *Dickerson v. United States*, 530 U.S. 428, 442 (2000), that findings under the voluntariness rubric will fail to identify situations of actual compulsion and thus will lead courts to allow affirmative use of evidence that *Kastigar v. United States*, 406 U.S. 441 (1972), requires to be suppressed. Indeed, *Miranda* proceeds on precisely this basis.

It is therefore no surprise that even after *Chavez*, lower courts continue to insist that where *Miranda*'s rules apply, it is *mis*conduct for police to disregard them. *See, e.g., State v. Knapp*, 666 N.W.2d 881, 899

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[9] *E.g., Chavez*, 123 S. Ct. at 2005 (opinion of Thomas, J.) ("[D]eprivations of liberty caused by the most egregious official conduct, may violate the Due Process Clause.") (internal quotations omitted).

[10] *Watts v. Indiana*, 338 U.S. 49, 55 (1949) ("[T]he Due Process Clause *bars police procedure* which violates the basic notions of our accusatorial mode of prosecuting crime *and* vitiates a conviction based on the fruits of such procedure.") (emphasis added). *Cf. Ireland v. United Kingdom*, 2 EHRR 25 (1978) (inhuman or degrading treatment is categorically prohibited, regardless of the use to be made of any information obtained); *Public Committee Against Torture v. State of Israel*, H.C. 5100/94 (Israel S. Ct., 1999) (same).

(Wis. 2003) (admitting evidence obtained by disregarding *Miranda* "would minimize the seriousness of the police misconduct . . . and encourage the type of conduct that *Miranda* was designed to prevent"). Similarly, Justice Marvin Baxter notes, concurring in *People v. Neal*, 31 Cal. 4th 63, 90-91, 72 P.3d 280, 297-98 (2003):

> [R]efusal to extend the exclusionary sanction of *Miranda* to impeachment evidence is not founded upon any notion that it is legitimate for the police to interrogate a suspect in custody despite his demand for counsel. . . . It could not be clearer that efforts to gather court evidence by such means are improper. . . . [I]t is unconscionable for police departments or supervisors to give contrary instruction or encouragement to the officers under their jurisdiction. . . . Officers must be made aware that *they have an absolute obligation to play by the rules* . . . . There can be no suggestion . . . that improper interrogation tactics are required, encouraged, approved, condoned, or tolerated.

Id. (emphasis added).

2. Absent Attenuation, Exclusion Of Derivative Physical Evidence Is Necessary To Deter Objectively Unreasonable Disregard Of *Miranda*'s Constitutionally Mandatory Rules.

Effective enforcement of *Miranda*'s interrogation rules requires the exclusion of evidence gained by disregarding those rules. If police and prosecutors can make affirmative use of the unattenuated fruits of a *Miranda* violation, their incentives to avoid such violations will inevitably be weakened. The Government's argument to the contrary, Br. U.S. 33-35,

defies common sense and all known conceptions of rational police behavior.

As this Court noted in *Tucker*, the Fourth Amendment exclusionary rule serves "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Tucker*, 417 U.S. at 446 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). This deterrence rationale was inapplicable on the facts of *Tucker* because Tucker's confession had been taken prior to *Miranda*, but the *Tucker* Court nonetheless noted that "in a proper case this [deterrence] rationale would seem applicable to the Fifth Amendment context as well." *Id.* at 447.

It is true, as the Government stresses, Br. U.S. 35, that an exception allowing affirmative use of derivative fruit would not lead police officers to ignore *Miranda* (or other constitutional rules) in *all* cases. But the relevant concern is whether allowing affirmative use of derivative fruit will lead officers to ignore constitutional rules in a significant *portion* of their cases. The present case illustrates why such situations would arise frequently in connection with *Miranda*. Detective Benner's sole concern was to investigate a weapons-possession offense. In that setting, a rule allowing affirmative use of derivative fruit gives an officer everything to gain and nothing to lose by ignoring *Miranda*. If he gets a statement, he can locate and use the weapon; the inadmissibility of the statement itself becomes irrelevant.[11] Similar incentives to ignore *Miranda* may not be decisive in every such case, but they can have substantial influence in investigations for possession of firearms or stolen goods, and in any situation where the suspect may know the location of

[11] The only defense available in such a case would be an attempt to deny knowledge of the weapon's existence, but in that event the defendant's statement would be admissible to impeach his denial. *Harris v. New York*, 401 U.S. 222 (1971). As the court below correctly noted, allowing the agent to testify about the location of the weapon is in every practical respect identical to allowing him to testify about the statement itself. *United States v. Patane*, 304 F.3d 1013, 1027 (10th Cir. 2002).

important tangible evidence. *See* David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 Ohio St. L. J. 805, 846 (1992) ("Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence.").

Incentive effects are especially important in the case of *Miranda*'s cut-off requirement. The practice of continuing to press for answers when a suspect refuses to talk was probably the single most important source of interrogation abuses under the voluntariness test. Accordingly, *Miranda*'s most important measure for preventing such abuses is its rule that when a suspect invokes his right to remain silent, "the interrogation must cease." *Miranda*, 384 U.S. at 474.[12] Yet in this common situation (roughly 20% of felony arrestees invoke their right to silence[13]), investigators who can use derivative fruit have *no* incentive to comply with *Miranda*: suppression of any resulting statement would leave them no worse off than if they had honored the suspect's decision to remain silent, and derivative evidence obtained through the tainted statement would be fully admissible. Under a rule allowing use of unattenuated fruit, incentives to respect the *Miranda* cut-off rule are virtually non-existent.

There is no need to speculate about these points. As the court below noted, there are a "multitude of reported cases" in which officers *intentionally* violated *Miranda* in order to procure derivative evidence. *See United States v. Patane*, 304 F.3d 1013, 1027 (10th Cir. 2002) (citing cases). Indeed, law enforcement officials who assume the admissibility of derivative fruit often *train* their investigators to interrogate without reading the warnings (*Missouri v. Seibert*, No. 02-1371), or to ignore a suspect's decision to remain silent (*People v. Neal*, *supra*). Without a rule barring use of derivative

[12] This requirement is easy to comply with, because the request must be unambiguous. *See Davis v. United States*, 512 U.S. 452 (1994).

[13] Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 (1996).

fruit, the only safeguard against overreaching in such situations is the unsatisfactory voluntariness standard; the predictable result—intensive questioning despite a suspect's pleas to be left alone— has lead to the very sorts of inhumane treatment that *Miranda* was intended to discourage. *See, e.g., People v. Neal, supra.* Measured against these concrete examples, the Government's claim that "suppression of the unwarned statement itself . . . is a sufficient deterrent," Br. U.S. 33, rings hollow.

In *every* area of police practice governed by constitutional rules, this Court has concluded that incentives for compliance will be insufficient unless non-attenuated derivative evidence is excluded from the prosecution's case-in-chief. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (illegal search); *Brown v. Illinois*, 422 U.S. 590 (1975) (illegal arrest); *Weatherford v. Bursey*, 429 U.S. 545 (1977) (intrusion on attorney-client trial preparation); *United States v. Wade*, 388 U.S. 218 (1967) (lack of counsel at line-up); *Nix v. Williams*, 467 U.S. 431 (1984) (lack of counsel at post-arraignment questioning); *cf. Nardone v. United States*, 308 U.S. 338 (1939) (wiretap in violation of statute). In *every* such area, moreover, the rules excluding derivative evidence apply not only to intentional violations but also where, as here, police conduct is unreasonable. In all of these settings, this Court has recognized that allowing police to profit from negligent mistakes would put a premium on ignorance and poor training rather than encouraging reasonable efforts to learn and comply with constitutional rules.[14]

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[14] This case affords no occasion to address the effect of a *reasonable* mistake about *Miranda* rules that are technical or difficult to apply. Because attenuation principles already give weight to the reasonableness of an officer's mistake, there may be little need for a different analytic framework in that setting. More to the point, however, this case presents no occasion to consider that problem because by any measure, Detective Benner's conduct violated clear, well-established rules.

B. The Miranda Rights Applicable At Trial Require That Tainted Derivative Evidence Be Excluded From The Prosecutor's Case-In-Chief.

It is well settled that the Fifth Amendment requires the exclusion at trial of compelled, self-incriminatory statements and all evidence derived from such statements. *Kastigar v. United States*, 406 U.S. 441 (1972). This exclusionary principle serves several Fifth Amendment values. Although the compulsion used to obtain a confession normally casts no doubt on the reliability of derivative physical evidence, the Fifth Amendment is not concerned solely or even principally with reliability. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

Among the "complex of values" underlying the Fifth Amendment, *Miranda*, 384 U.S. at 460 (citing *Murphy*, 378 U.S. at 94), two in particular explain the exclusion of physical fruit. First, the Self-Incrimination Clause is intended to block government from gaining an evidentiary advantage by forcing an individual to speak. *Murphy*, 378 U.S. at 54-55. Such evidentiary advantage results not only when prosecutors use the compelled statement itself but equally when they use physical evidence derived from it. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

Second, the Self-Incrimination Clause was intended to prevent brutality and other inhumane interrogation tactics. *Murphy*, 378 U.S. at 55 (noting "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses"). Again, allowing affirmative use of derivative physical evidence would create incentives for such behavior just as certainly as allowing use of the confession itself. Thus, it is universally accepted that the rule excluding testimonial evidence is equally applicable to reliable physical evidence, whenever the statement leading to that evidence was unambiguously compelled. *Chavez v. Martinez*, 123 S. Ct. 1994, 2002 (2003) (opinion of Thomas, J.) ("[T]hose subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived

from their statements) in any subsequent criminal trial.").

In *Miranda*, this Court adopted rules intended to avoid the "unacceptably great" risk that statements obtained by custodial interrogation will be involuntary. *Dickerson v. United States*, 530 U.S. 428, 442 (2000). The *Miranda* framework conserves judicial resources and avoids the need for judges to resolve issues under the "useless" or "perplexing" voluntariness rubric. *Miller v. Fenton*, 474 U.S. 104, 114 n.4 (1985). Its goal is to provide assurance that Fifth Amendment values are served: that a defendant's forced mental cooperation has not helped build the prosecution's case and that the possibility of an inaccurate finding of "voluntariness" will not tempt investigators to use inhumane or degrading methods. *Murphy*, 378 U.S. at 54-55.

Dickerson reaffirmed that if police disregard the *Miranda* procedures, compulsion is conclusively presumed when courts determine the admissibility of a resulting confession in the prosecutor's case-in-chief. 530 U.S. at 442. Once that much is acknowledged, Fifth Amendment principles afford no basis for treating derivative evidence differently.

The Government seeks to exempt derivative evidence from the exclusionary principles of *Miranda* and *Dickerson* by emphasizing that derivative physical evidence is normally reliable. Br. U.S. 26-27, 35-37. But as *Dickerson* holds, *Miranda*'s presumption of compulsion remains irrebuttable, and statements taken in violation of *Miranda* must be suppressed, even when reliability concerns are absent, as when corroborating physical evidence proves that the presumptively coerced statements are true. 530 U.S. at 442. Under the Government's narrow, reliability-centered conception of the Fifth Amendment, that result is incomprehensible; indeed the Government fails to explain how, under its reliability-centered conception, *Kastigar* could have required the suppression of reliable physical evidence derived from demonstrably compelled statements. The Government's approach, if sound, requires reconsideration of *Dickerson* and of *Kastigar* itself.

The Government's approach is not sound, however, for the simple reason that the primary concern of the Fifth Amendment is not reliability but the need for a "comprehensive safeguard" to prevent forced mental cooperation and reduce the temptation for investigators to use brutal or degrading methods. *Kastigar*, 406 U.S. at 460. To be sure, *Miranda* goes beyond situations of clear compulsion to those involving unacceptable *risks* of compulsion. But those risks threaten Fifth Amendment values in the same ways that proven compulsion does. A risk of compulsion entails a corresponding risk that prosecutors will reap gains from forced cooperation and that investigators hoping for such gains will slide toward the use of inhumane methods. *See Quarles*, 467 U.S. at 656 (noting *Miranda*'s premise that warnings "would reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation . . . .").

Because those risks are present even when the risk of unreliability is not, it is undisputed that *Miranda*'s presumption of compulsion remains irrebuttable when determining the admissibility of an unwarned but demonstrably reliable confession. *Dickerson*, 530 U.S. at 442. The relevant considerations are identical when a prosecutor seeks to make affirmative use of reliable physical fruit—the problems posed by the elusive, error-prone voluntariness inquiry and the danger to Fifth Amendment values are the same for derivative evidence as they are for a fully corroborated confession.[15]

The considerations change, as do the applicable exclusionary rules, when the prosecution seeks to introduce tainted evidence for impeachment purposes. A demonstrably compelled statement and its fruits are inadmissible, *New Jersey v. Portash*, 440 U.S. 450 (1979), but absent a finding of actual compulsion, an unwarned statement and its fruits can be used to

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[15] Whether the issue concerns clearly compelled or presumptively compelled confessions, it is not plausible to suggest that the scope of Fifth Amendment protection should depend in accordion fashion on which, or how many of the underlying Fifth Amendment concerns are implicated.

impeach, *Harris v. New York*, 401 U.S. 222 (1971). In the latter situation, the interest in preventing perjury justifies the effort to determine actual compulsion under all the circumstances, *id.* at 225, and the prospect of impeachment use has few of the deterrence costs associated with allowing use of tainted evidence in the prosecutor's case-in-chief. Therefore, in the impeachment context, *Miranda*'s presumption of compulsion is set aside, as *Harris* holds, not only for derivative evidence but for the unwarned statement itself. Conversely, where affirmative use is at issue, the need for *Miranda*'s presumption of compulsion, acknowledged in *Dickerson*, has precisely the same force for derivative evidence as for unwarned statements.

In short, Fifth Amendment values apply in the same way to presumptively compelled statements as they do to derivative evidence, and it is necessary to bar the affirmative use of both, except when the prosecution can establish an independent source, inevitable discovery or attenuation.[16]

IV. Allowing Police To Exploit Their Own Objectively Unreasonable Conduct Will *Hinder* The Interrogation Process, Cause Difficulty For Investigators And Courts, And Offer No Significant Benefits For Responsible Law Enforcement.

A decision reversing the result below, even if it does not embrace the Government's ambitious reinterpretation of *Miranda*, will have important symbolic and practical consequences. Such a decision will cloud the perceived legitimacy of closed-door interrogation and promote public cynicism about whether legal norms are binding when law enforcement officials themselves are affected. For police and courts, such a decision will destabilize the procedures they

[16] These standard exceptions to the exclusionary rule apply even in core cases of Fifth Amendment compulsion. *See Darwin v. Connecticut*, 391 U.S. 346, 349 (1968); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 277 (1983) (Blackmun, J., concurring).

have used to adapt successfully to *Miranda* and will reestablish the vague voluntariness standard as the principal check on interrogation practices in many frequently recurring situations. There is no legitimate law enforcement need to incur these costs, because *Wong Sun* attenuation principles already afford ample room for flexible, common sense resolution of derivative evidence issues.

A. A Decision Permitting Police To Exploit Their Own Negligence Will Impair The Perceived Legitimacy Of Law Enforcement, And Promote Public Cynicism About The Law Itself.

Experienced law enforcement leaders believe that the *Miranda* rules governing police practices are appropriate and that they offer substantial benefits for law enforcement. *See* Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621, 672 (1996). *Miranda* procedures are less difficult for police officers to follow than the voluntariness test. *Dickerson*, 530 U.S. at 443-44. By assuring the public that police must operate within defined rules, *Miranda* provides legitimacy to the process of interrogation behind closed doors; it has given a generation of Americans confidence that if brought to the police station for questioning, we have the right to remain silent and that the police will respect our choice to exercise that right. Leo, *supra*, at 671-72; *id.* at 680 ("[T]he institutions of law enforcement have not only successfully adapted to . . . *Miranda*, but have publicly embraced *Miranda* as a legitimating symbol of their professionalism and commitment to fairness in the criminal process.").

The Government appears to argue that even if this Court preserves *Miranda*'s direct applicability to the police, a decision authorizing affirmative use of derivative evidence would not undercut the integrity of the rules governing interrogation. Br. U.S. 33-35. Yet the Government nowhere explains how a decision permitting direct exploitation of objectively unreasonable conduct could avoid having exactly that

effect, particularly when it would be a decision with the public visibility that attaches to a decision of this Court.

The ordinary person knows as well as any lawyer that a legal norm has little meaning if those ostensibly bound can reap direct benefits from their unreasonable failure to respect it. Accordingly, wherever constitutionally based rules seek to prevent a form of police misconduct, this Court consistently requires the suppression of unattenuated derivative evidence. *See* Section III.A.2, *supra*. Indeed, the Government quickly concedes that "[t]he government's primary argument is that . . . the police do not engage in misconduct by questioning without providing the warnings." Br. U.S. 33. The Government's disclaimers notwithstanding, its subsidiary argument for permitting exploitation of unreasonable practices necessarily rests on the Government's refusal to accept the principle that the underlying conduct is wrong.

Yet whether one approves of *Miranda* or not, "*Miranda* [is] a constitutional decision of this Court." *Dickerson*, 530 U.S. at 432. Nothing would be more destructive of law enforcement legitimacy, and indeed of the overall credibility and fairness of our legal system, than for this Court to announce that although the *Miranda* rules are constitutionally required, police can gain affirmative benefit from unreasonable failures to follow them. *See State v. Knapp*, 666 N.W.2d 881, 899 (Wis. 2003) (admitting evidence derived from failure to comply with *Miranda* would "breed contempt for the law"). As Justice Marvin Baxter stresses, concurring in *People v. Neal*:

> In a free society, we place the police in a position of unique power, but only on condition that they will do their best to uphold the law . . . . Their ability to function effectively depends upon their credibility in that role. . . . When the police dishonor proper procedures [mandated by *Miranda*], community respect for the police, and for the law itself, is undermined.

31 Cal. 4th at 91, 72 P.3d at 298.

B. A Decision To Reject Traditional Attenuation Principles In The Case Of *Miranda*-Fruits Would Generate Significant Practical Problems.

Several new problems will emerge with any rule permitting police to use evidence derived from a "voluntary" statement. Routine police practices will be destabilized. For courts, the voluntariness inquiry will again become the framework for judicial suppression decisions whenever affirmative use of derivative fruit is sought. Added to the subjective state-of-mind inquiry mandated by the voluntariness requirement will be a new subjective inquiry into the state of mind of the police officer, in order to assure that his objectively unreasonable disregard of *Miranda* was not deliberate. To be sure, that inquiry could be avoided if this Court is willing to condone deliberate disregard of *Miranda*, but that step would replace a small difficulty with a far larger one, aggravating the concerns about law enforcement legitimacy already described. *See* Section IV.A, *supra*.

1. A Rule Permitting Affirmative Use Of Derivative Evidence Would Destabilize The Routine Practices That Police Have Used To Adapt Successfully To *Miranda* and Damage The Effectiveness Of Routine Interrogation Practices.

One of *Miranda*'s most important objectives was to avoid the vagaries of the voluntariness test and provide clear guidance, so that police would know on-the-spot exactly what they must do to assure the admissibility of evidence obtained by interrogation. *Dickerson*, 530 U.S. at 444; *Quarles*, 467 U.S. at 658.

The Government's approach would dilute that objective by half. *Miranda* would continue to give police clear guidance concerning the admissibility of *statements* obtained by interrogation, but to assess the admissibility of derivative evidence obtained by interrogation, police would once again be required to assess voluntariness.

To be sure, statements will be the dominant concern in many law enforcement contexts. But in others, statements will just as surely be secondary or of no importance, compared to the fruit they can generate. This case involves just such a situation, and there are others in frequently recurring law enforcement contexts. *See* Section III.A.2, *supra*. And even when an officer's preference would be to obtain an admissible statement, that goal plays no significant role in the 20% of felony cases in which a suspect invokes his right to silence.[17] In such situations, the voluntariness framework would become the only guide for determining how hard an interrogator may press his suspect to reveal incriminating details.

In all of those contexts, the Government's proposed approach would recreate the world that *Miranda* sought to avoid, one in which officers "fac[e] a continu[al] risk that valuable evidence would be lost." *Tucker*, 417 U.S. at 443. Nearly forty years of successful police adaptation to *Miranda* would be exchanged for a complex system combining *Miranda* and voluntariness guidelines in a new and at best uncertain way.

In many ways, such a system will *hinder* police efforts to conduct successful interrogations. Because the *Miranda* rules reassure suspects that they can cut off an unwanted interrogation at any time, *Miranda* encourages many suspects to let down their guard and try to provide an exculpatory story. *See* David Simon, *Homicide* 197-202 (1991). Although *Miranda* has reduced inappropriate interrogation pressure, the confession rate has not suffered.[18] Adapting to *Miranda*, interrogation methods have changed for the better; today, suspects typically confess not because of fear of mistreatment but primarily because of misplaced

[17] *See* n.13, *supra*.

[18] Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 280-81 (1996); George C. Thomas III, *Plain Talk About the Miranda Empirical Debate*, 43 UCLA L. Rev. 933 (1996); John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 Stan. L. Rev. 1147 (1998).

confidence in their ability to talk their way out of trouble.[19]

These benefits of *Miranda* for responsible law enforcement depend crucially on public awareness that the *Miranda* procedures are binding on the police and will be followed consistently. And that is precisely how *Miranda* is currently understood. *See Dickerson*, 530 U.S. at 443 ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."). A decision by this Court announcing that the *Miranda* rules *do not* govern the police is not only unsupportable in law, as we have shown, *see* Section III.A.1, *supra*, but such a decision would jeopardize *Miranda*'s law enforcement benefits as certainly as if this Court had simply overruled *Miranda* three years ago. *See* Leo, *Impact of Miranda*, *supra*, at 680 ("[T]he symbolic message . . . — that police can disregard constitutional rights when interrogating criminal suspects—would cause a backlash of resentment against, and more distrust of, American police.").

2. Judicial Suppression Decisions Would Be Burdened By The Elusive Inquiry Into Voluntariness.

In every case involving a *Miranda*-fruits question, courts would be required to determine whether the initial statement was "voluntary." Indeed that issue remains open in this case itself. J.A 85, 86. Voluntariness inquiries require time-consuming evidentiary hearings and remain difficult to resolve even outside the pressured environment in which police officers operate. *See Miller v. Fenton*, 474 U.S. 104, 114 n.4 (1985) ("The voluntariness rubric has been variously condemned as useless, perplexing, and legal double talk.") (internal quotations and citations omitted). In addition to its "totality of the circumstances"

[19] Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 Crime, L. & Soc. Change 35 (1992); Peter Carlson, *You Have the Right to Remain Silent*, Washington Post, Sept. 13, 1998, at 6.

component, the voluntariness test also includes a number of disparate rules that hold certain interrogation tactics impermissible per se, regardless of circumstances. *See* Catherine Hancock, *Due Process Before Miranda*, 70 Tulane L. Rev. 2195 (1996). The resulting "cornucopia of Due Process tests," *id.* at 2237, gives little guidance and is "more difficult than *Miranda* . . . for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444.

3. Suppression Decisions Would Be Additionally Burdened By The Need To Determine Whether The Disregard Of *Miranda* Was Deliberate.

The Government's proposed reinterpretation of *Miranda*, if accepted in its entirety, would allow affirmative use of derivative evidence even when an officer deliberately chose to violate *Miranda*. But short of that step, which we discuss below, *see* Section IV.B.4, a rule admitting the fruit of unreasonable disregard of *Miranda* would require a court to find not only that the initial statement was "voluntary," but also that the disregard of *Miranda* was not intentional. Suppression hearings would therefore require two subjective inquiries, one concerning the suspect's state of mind and a second concerning that of the officer.

Determinations of subjective police intent are by no means impossible and are familiar to this Court in a number of contexts. *See Whren v. United States*, 517 U.S. 806, 812 (1996) (exemption from the probable cause requirement in inventory and administrative searches "is not accorded to searches that are not made for those purposes."). In situations involving interrogation post-indictment, a Sixth Amendment right-to-counsel claim requires proof that the government "deliberately elicited" information. *Brewer v. Williams*, 430 U.S. 387, 400 (1977). That intent inquiry has not proved unmanageable.[29]

Nonetheless, intent inquiries are more time-consuming and difficult than the straightforward inquiry into whether police conduct was objectively reasonable. Intent inquiries are also less useful in enabling officers to know what is expected of them in the future. These concerns have led this Court to focus in most law enforcement contexts on objective reasonableness. That has been the touchstone not only for Fourth Amendment inquiries, *Whren*, *supra* (justification for arrest); *Florida v. Bostick*, 501 U.S. 429 (1991) (forcible stop); *Graham v. Connor*, 490 U.S. 386, 397 (1989) (excessive force), but for Fifth Amendment *Miranda* inquiries as well, *Oregon v. Mathiason*, 429 U.S. 492 (1977) (custody); *Innis*, *supra* (interrogation). If, as we argue, preservation of a viable *Miranda* system requires this Court to stop short of an unbounded derivative-evidence exception, a requirement of objective reasonableness offers a simpler and more familiar means to constrain that exception than an inquiry focused on a police officer's subjective good faith.

4. A Rule Permitting Police To Use The Fruits Of Deliberate Disregard Of *Miranda* Would Create Unacceptable Risks Of Brutal Or Degrading Interrogation Treatment And Would Place Intolerable Strain On The Perceived Legitimacy Of The Law Enforcement System.

The admissibility of evidence obtained through deliberate disregard of *Miranda* is the principal issue presented in *Missouri v. Seibert*, No. 02-1371, and will be fully argued there. Here it suffices to make the simple point that has been clear to state judges who see first hand the results produced when police believe they have the power to flout *Miranda* deliberately.

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[29] Compare *United States v. Henry*, 447 U.S. 264 (1980) (finding intent to elicit), with *Kuhlman v. Wilson*, 477 U.S. 436 (1986) (finding no intent to elicit).

Investigators who view *Miranda* in that way have too often pursued overbearing interrogation tactics to the point of breaking a suspect's will and inflicting serious abuse. *See, e.g., People v. Neal*, 31 Cal. 4th at 82-83, 72 P.3d at 291-92. Official willingness to flout *Miranda* "[undermines] community respect for the police," *id.* at 91, 298 (Baxter, J., concurring), and "breed[s] contempt for the law," *Knapp*, 666 N.W.2d at 899. A decision permitting intentional departures from *Miranda* would transform *Miranda* from a famous symbol of legitimacy in law enforcement to a landmark example of legal double talk.

C. There Is No Legitimate Law Enforcement Need To Allow Affirmative Use Of Evidence Derived From Unreasonable Disregard Of *Miranda*.

The loss of reliable evidence becomes a serious concern whenever constitutional rules are so technical and obscure that officers who want to comply with them are unable to do so. If that were true of *Miranda*, this would be a different case, and indeed *Dickerson* itself might have been decided differently. But for more than twenty years this Court has rejected that complaint. This Court's view, amply supported by empirical study,[21] is that "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Innis*, 446 U.S. at 304 (Burger, C.J. concurring); *Dickerson*, 530 U.S. at 443.

This is not to say that reasonable mistakes in applying *Miranda* can no longer occur. But that problem is not presented in this case, and as we have urged, there is no need for this Court to speculate now about how best to resolve it. *See* note 14, *supra*. In contrast, where regard of *Miranda* was objectively unreasonable, constitutional norms and sound principles of law enforcement administration offer strong reason to "compel respect for the constitutional guaranty in the only available way—by removing the incentive to disregard it." *Elkins*, 364 U.S. at 217.

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[21] *See* n.17, *supra*.

The flexible *Wong Sun* tests leave ample room for accommodating legitimate law enforcement needs in such instances. The *Wong Sun* approach considers independent source, inevitable discovery, and a fact-specific attenuation analysis. In assessing attenuation, courts typically weigh such factors as the passage of time, the existence of intervening events, whether the violation was intentional, and whether the derivative evidence was obtained by deliberate exploitation of initial misconduct.[22]

Application of this well-settled approach to the present case is straightforward. Detective Benner set out to find Patane's firearm, and he got Patane to reveal its location by an inexcusable violation of *Miranda*'s most elementary requirements. He then used the information obtained to go directly to the place where the weapon was kept, seize it, and use it in a way that was in every respect equivalent to using the statement itself. A legal system that accepts the inadmissibility of the statement cannot justifiably make affirmative use of its fruit under these circumstances.

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[22] *See* Wayne R. LaFave, Jerold H. Israel and Nancy J. King, Criminal Procedure 502-23 (3d ed. 2000).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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